

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TAHVIO GRATTON, an individual,

Plaintiff.

V.

UNITED PARCEL SERVICE, INC.,
a Delaware Corporation,

Defendant.

NO. 1:22-CV-3149-TOR

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE COURT is Plaintiff's Motion for Partial Summary Judgment

(ECF No. 52) and Defendant's Motion for Summary Judgment (ECF No. 53). The

15 | Court has reviewed the record and files herein, is fully informed, and finds that

16 oral argument is unnecessary to resolve these motions. For the reasons discussed

17 below. Plaintiff's Motion for Partial Summary Judgment is **GRANTED IN PART**

18 and Defendant's Motion for Summary Judgment is **GRANTED IN PART**.

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1 **BACKGROUND**

2 This case arises out of Plaintiff Tahvio Gratton's charges of racial
3 discrimination against his former employer, Defendant United Parcel Service.

4 **I. Plaintiff's Work History**

5 In September 2016, Plaintiff began working for Defendant as a package car
6 cover driver at Defendant's Seattle, Washington distribution center. ECF No. 54 at
7 2, ¶ 1. As a cover driver, Plaintiff's primary responsibility was to cover the shifts
8 of drivers with regular routes who were out for the day. *Id.* at 3, ¶ 9. Two years
9 into his tenure at UPS, Plaintiff relocated to Yakima, Washington, and began
10 working at Defendant's facility there. ECF Nos. 54 at 3, ¶ 4; 52 at 3. At both
11 locations, the parties' employment relationship was governed by the terms of a
12 National Master Collective Bargaining Agreement (Master CBA) and the Western
13 Supplemental Agreement (Supplement) (collectively, the CBA) negotiated by the
14 International Brotherhood of Teamsters Union (Union). ECF Nos. 53 at 3; 54 at 2,
15 ¶ 2; 55-1 at 302. As is pertinent here, the CBA outlines grievance procedures for
16 employees raising workplace issues as well as for processing discharges,
17 suspensions, and terminations. ECF No. 55-1 at 519-27.

18 Tensions began to arise between Plaintiff and Defendant shortly after
19 Plaintiff's transfer to the Yakima center. On April 20, 2018, Plaintiff filed a
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1 grievance with the Union asserting that he had been “laid off”¹ on multiple
2 occasions without advance notice and in violation of his contractual guarantee to
3 work a certain number of hours. ECF No. 68-1 at 9. Plaintiff argues that he was
4 frequently laid off in favor of white drivers with less seniority than him. ECF Nos.
5 66 at 2; 68-1 at 13. Defendant, on the other hand, maintains that Plaintiff was laid
6 off because shifts for cover drivers were assigned based on seniority, and Plaintiff
7 was more junior due to his recent transfer. ECF No. 53 at 3-4. Defendant also
8 states that it only offered lower-ranked white drivers work over Plaintiff on a
9 layoff day when Plaintiff failed to respond to Defendant’s calls and text messages
10 asking him to come in. ECF Nos. 75 at 5-6; 67 at 2; 55-1 at 176. Plaintiff disputes
11 that he was unresponsive to Defendant. *Id.* Regardless, as a result of the
12 grievance, Defendant was required to begin posting a regular schedule that notified
13 drivers of upcoming lay-off days, and Plaintiff received back wages for the hours
14 he missed. ECF Nos. 55-1 at 174; 75 at 4.

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¹ Cover drivers are assigned shifts based on seniority, and may be “laid off”
18 on days they are otherwise scheduled to work based on the schedules of other
19 drivers with regularly assigned routes and the volume of packages. ECF No. 54 at
20 3, ¶¶ 7-8.

1 On April 25, 2018, about one week after the filing of the initial grievance,
2 On-Road Supervisor Sam O'Rourke accompanied Plaintiff on a ride-along
3 observation. ECF No. 54 at 4, ¶ 14; 67 at 3. Throughout the trip, Mr. O'Rourke
4 repeatedly referred to Plaintiff as “boy,” saying things like, “[m]ove faster boy”
5 and “[l]et’s get going boy, let’s move.” ECF No. 52-2 at 12-13; 32, ¶ 12-14.
6 When Plaintiff greeted a customer he normally talked with as he unloaded his
7 truck, Mr. O'Rourke said, “I didn’t tell you to talk, boy.” ECF No. 52-2 at 32, ¶
8 12; 33, ¶ 19. When Plaintiff asked O'Rourke to stop referring to him as boy, Mr.
9 O'Rourke allegedly refused. ECF No. 52-2 at 43. Both Plaintiff and a customer
10 who witnessed a portion of this exchange were offended by the racial undertones
11 of O'Rourke’s speech.

12 Plaintiff reported O'Rourke’s conduct to Yakima Center Manager Erik
13 Loomis the following morning. ECF Nos. 68-1 at 15, 69-1 at 3, ¶ 7. Mr. Loomis
14 appeared unconcerned and simply replied, “That’s just the way Sam talks.” ECF
15 No. 69-1 at 3, ¶ 7. Nevertheless, Mr. Loomis later conceded that Mr. O'Rourke’s
16 language could “definitely . . . be perceived” as racist or derogatory, although he
17 did not believe that Mr. O'Rourke intended for it to be taken as such. ECF Nos.
18 52-2 at 40; 55-1 at 125. Mr. Loomis claims that he had an informal discussion
19 with Mr. O'Rourke and counseled him not to use the word “boy” in reference to
20 Plaintiff again. ECF No. 55-1 at 125-28.

1 Plaintiff avers that Yakima supervisors retaliated against him after his report
2 to Mr. Loomis. ECF No. 66 at 3. Specifically, Plaintiff claims that Mr. Loomis
3 and Plaintiff's direct supervisor, Matthew Fromherz—a friend of Mr.
4 O'Rourke's—began verbally abusing him and denying him work. *Id.*; ECF No.
5 68-1 at 145. In one incident, Plaintiff recounts that he approached Mr. Fromherz
6 regarding a series of recent layoffs and asked why he wasn't being put on schedule
7 despite there being work to do. ECF No. 68-1 at 17. In apparent reference to Mr.
8 O'Rourke's earlier "boy" comments, Mr. Fromherz reportedly replied, "Because
9 you didn't come and ask me like a man." *Id.* Mr. Fromherz denies that this
10 happened. ECF No. 5-2 at 120. Another time, Plaintiff states that he came to work
11 on a day off to collect a package, as he regularly did, and that Mr. Fromherz yelled
12 at him to "[g]et the fuck off the property" after learning he was not there for work
13 purposes. ECF Nos. 66 at 3; 68-1 at 15. Mr. Fromherz disputes this occurred as
14 Plaintiff describes, claiming that Plaintiff was interfering with a delivery. ECF No.
15 55-1 at 179-80. Plaintiff reported these incidents to Mr. Loomis, who allegedly
16 failed to take corrective action. *Id.* Therefore, in June 2018, Plaintiff grieved these
17 concerns to the Union. ECF No. 54 at 4-5, ¶¶ 16-17; 55-1 at 68, 216.

18 Plaintiff alleges that after he filed grievances in June 2018, his supervisors
19 began searching for reasons to fire him. He provides a record retained by his
20 supervisors of formal discussions they had with him, which documents issues such

1 as taking a 27- or 29-minute lunch instead of the full 30-minute time allotted and
2 failing to respond to a request to come in on days where he had been previously
3 informed he was laid off. ECF No. 68-1 at 166-67. One supervisor, Michelle
4 Reyes, declared that she was present on multiple occasions where Mr. Fromherz
5 and Mr. Loomis discussed their desire to “get rid” of Plaintiff. ECF No. 68-1 at 4,
6 ¶ 6; *but see id.* at 116-17 (Mr. Loomis averring that it was possible he mentioned it
7 would “be better” if Plaintiff were gone, but that he did not directly express that he
8 wanted to fire Plaintiff). Another employee, Lisa Irvine, witnessed the same thing.
9 ECF No. 52-2 at 128. Plaintiff also claims that he was berated for having visible
10 tattoos in violation of the dress code where other white drivers were not. ECF No.
11 68-1 at 14, 70. Mr. Loomis disputes this and says that white employees were
12 corrected on an equal basis for dress code infractions. ECF No. 73 at 7.

13 In October 2018, Plaintiff assumed the position of “bid driver,” meaning he
14 had a regular daily route that he drove each day and no longer had to cover for
15 others. ECF No. 52-2 at 23. However, Plaintiff asserts that he was only able to bid
16 for the “mall route,” which was the bulkiest and least desirable route, because Mr.
17 Loomis refused to teach him any other route. *Id.* at 24. Plaintiff also claims that,
18 on the one occasion where Mr. Loomis offered Plaintiff the opportunity to learn an
19 alternative open route, Mr. Loomis informed Plaintiff that he would have to learn
20 the route from Mr. O’Rourke. *Id.* at 23-24. Plaintiff refused to do another ride-

1 along with Mr. O'Rourke. *Id.* Plaintiff believes that Mr. Loomis convinced
2 Brandon Ward, a driver with more seniority than Plaintiff, to bid on the mall route
3 so Plaintiff would not get it, but that Mr. Ward eventually took his name off the list
4 and Plaintiff was awarded the route by default. ECF Nos. 52-2 at 60; 68-1 at 43-
5 44. On October 19, 2018, Plaintiff filed a charge of discrimination with the U.S.
6 Equal Employment Opportunity Commission (EEOC), alleging that he had been
7 discriminated against and harassed on the basis of race, and that he had been
8 retaliated against for complaining about such conduct. ECF No. 52-2 at 62.

9 After acquiring the mall route, Plaintiff alleges that his supervisors conspired
10 to make his job more challenging. Ms. Reyes purportedly overheard Mr. Loomis
11 and Mr. Fromherz planning to “pile the work on [Plaintiff]” and to add stops to his
12 route that were out of the way. ECF No. 52-2 at 67, ¶¶ 9-10. Plaintiff also presses
13 that he was burdened with the worst truck, known among the drivers as the “death
14 truck,” which slowed his delivery time. ECF Nos. 69-1 at 4-5, ¶ 16; 66 at 5.

15 Oppositely, Mr. Fromherz testified at his deposition that extra stops were
16 added to the route, not the individual driver, and that there was no racial motive
17 behind adding stops to Plaintiff’s route. ECF No. 55-1 at 188, 190. More
18 frequently, Mr. Fromherz stated, other drivers were forced to help Plaintiff because
19 he took longer to complete his route. *Id.* at 187.

1 Plaintiff states that these issues continued throughout his employment at the
2 Yakima center. In one grievance dated June 11, 2020, Plaintiff alleged that Mr.
3 Loomis racially discriminated against him because he told Plaintiff that he could
4 only count the number of pre-packed bags (as opposed to individual packages),
5 towards his production quota. ECF No. 55-1 at 85-86. Plaintiff reported that a
6 white driver was allowed to count the number of packages instead of the number of
7 bags towards his production quota. ECF No. 55-1 at 85-86. Defendant, however,
8 states that it is UPS policy to count the number of pre-packed bags, not individual
9 packages; that the white employee's package count was in fact changed to comply
10 with said policy; and that the white employee did not receive any bonus. ECF No.
11 54 at 7-8, ¶¶ 32, 34-35.

12 Approximately six months later, in January 2021, Plaintiff grieved
13 “[c]ontinuous harassment and retaliation” from Mr. Loomis, stating, “Erik Loomis
14 has gone out of his way to make my job harder than it has to be . . . [by]
15 overloading my route, giving me a worse truck, and instructing supervisors to
16 comply with his malicious efforts to retaliate against me.” ECF No. 55-1 at 97-98.
17 He further added that he was working overtime and that Mr. Loomis was
18 retaliating against him for assuming the position of Union shop steward and
19 helping other black employees file grievances. *Id.*; *see infra* Background II.
20 (discussing grievances by other black drivers). In a related grievance filed eight

1 months later, in September 2021, Plaintiff wrote that management favored certain
2 drivers and that his route was being manipulated to make him appear like a slow
3 driver. *Id.* at 101. Plaintiff also testified that Mr. Loomis frequently withheld his
4 checks and that he had to file grievances for withheld wages. ECF No. 68-1 at 25,
5 54.

6 In response to Plaintiff's complaint regarding Mr. Loomis, Karl Leyert, a
7 labor manager for Defendant, began investigating Plaintiff's grievance. ECF Nos.
8 55-1 at 199; 68-6 at 8-9. Mr. Leyert determined that Mr. Loomis's actions were
9 not the product of racial bias, but instead the result of neutral application of UPS
10 policy. ECF No. 55-1 at 199. For example, regarding Plaintiff's complaint about
11 being assigned the "death truck," Mr. Leyert explained that UPS "switch[es] trucks
12 based off the route and the need of the vehicle," rather than the individual, and that
13 therefore the fact that Plaintiff switched routes meant he had a different truck. *Id.*
14 at 199-200. However, Mr. Leyert admitted that he did not interview Plaintiff or the
15 two references Plaintiff listed on his grievance. *See* 55-1 at 98; 200. In general,
16 Mr. Leyert felt that "there was no merit to a lot of [Plaintiff's] claims." ECF No.
17 68-6 at 23.

18 **II. Related Racial Allegations**

19 Other black employees of Defendant reported similar allegations of racial
20 harassment and retaliation by Yakima center supervisors. One employee, Derek

1 Tamez, testified that another on-road supervisor, Bill Peterson, referred to Plaintiff
2 as “that n***er Tahvio.” ECF No. 52-2 at 151. Mr. Peterson also allegedly stated
3 than a different black employee was “stupid and dumb and worthless.” ECF No.
4 52-2 at 152. Mr. Tamez reported the comments to Mr. Loomis, who apparently
5 shrugged it off, saying, “I don’t have any control over a lot of things that happen
6 here.” *Id.* at 152.

7 Another black employee, Xavier Briggs, was told at the beginning of his
8 employment that Mr. Loomis wanted him to successfully run his route five times
9 in order to complete his probationary period, whereas new white drivers were not
10 required to complete any test routes. ECF No. 52-2 at 52-3, ¶ 23. Mr. Briggs also
11 declared that white drivers received preferential treatment when it came to routes
12 and workload, and that he and Plaintiff frequently had to help with the misloads of
13 more junior white drivers. *Id.* at 53, ¶¶ 25-31.

14 Black employees also claimed that they were punished by management for
15 associating with Plaintiff. Mr. Briggs declared that Mr. Loomis approached him
16 and asked “if [he] knew of things that [Plaintiff] was doing wrong.” ECF No. 52-2
17 at 56, ¶ 49. When Mr. Briggs refused to answer, Mr. Loomis allegedly retaliated
18 by loading up Mr. Briggs’ route with extra stops. *Id.* at ¶ 51. =

19 Travis Anderson, a different black employee, also testified that he was
20 retaliated against by Mr. Loomis on account of his race. ECF No. 52-2 at 90, ¶ 4.

1 Mr. Anderson testified that after he prevailed on a wage grievance, Mr. Loomis
 2 approached him and told them that he needed to cut his hair or that his employment
 3 would be terminated. *Id.* at 90-91, ¶¶ 7-11. Mr. Anderson, who is Pan African,
 4 had always worn his hair long and had never been asked to cut it before. *Id.* at 90,
 5 ¶¶ 7-8. Mr. Anderson alleges that a white employee with a similar hairstyle was
 6 not asked to cut his hair. *Id.* at 91, ¶ 13. Due to his concerns, Mr. Anderson asked
 7 Plaintiff to help him file a religious exemption, which was successful. *Id.*

8 After prevailing on his exemption, Mr. Anderson declared that Mr. Loomis
 9 further retaliated against him by forcing him to cover up his tattoos. *Id.* at 91, ¶ 16.
 10 Mr. Anderson felt that he was being singled out on the basis of race because “there
 11 were white drivers with all kinds of tattoos showing all the time.” *Id.* at 92, ¶ 17.
 12 Mr. Anderson likewise testified that he overheard Mr. Loomis telling other drivers
 13 to stay away from Plaintiff and that Plaintiff was causing problems. *Id.* at ¶ 19.

14 **III. Plaintiff’s Termination**

15 Plaintiff was dismissed from employment on October 27, 2021 following
 16 allegations of sexual harassment alleged to have occurred on October 19, 2021.
 17 ECF No. 54 at 11, ¶ 49; 67 at 17, ¶ 50. Plaintiff and Defendant present conflicting
 18 accounts of the events leading up to Plaintiff’s dismissal.

19 According to Plaintiff, he tripped walking down the belt in the loading dock
 20 area of the Yakima warehouse. ECF No. 68-6 at 124. As he fell, Plaintiff reached

1 out to steady himself on the back of a nearby pre-load supervisor, Linda Hernandez
2 Cruz. *Id.* Plaintiff states that he did not realize it was Ms. Hernandez Cruz until he
3 straightened back up, at which point Ms. Hernandez Cruz said, “You touched me
4 inappropriately.” *Id.* Plaintiff clarified that he had only caught himself on her
5 back. *Id.* Ms. Hernandez Cruz warned, “Don’t ever do that again.”

6 Ms. Hernandez Cruz remembers the events of October 19 quite differently.
7 She recollects that she was training another employee in the loading area, and bent
8 over at one point to sort through the packages. ECF No. 55-1 at 227. At that
9 point, someone came from behind her and grabbed her lower hip. *Id.* She stood
10 up, and seeing Plaintiff, asked, “Why are you touching me inappropriate[ly]?” *Id.*
11 Plaintiff mumbled something back which Ms. Hernandez Cruz could not hear, and
12 then said he wasn’t touching her inappropriately. *Id.*

13 Other employees who were present for the incident also offer varying
14 accounts of what happened. Jose Ramirez Castillo was assisting with loading a
15 truck and saw Ms. Hernandez Cruz bend over to pick up a package. ECF No. 55-1
16 at 235-36. At that point, Mr. Ramirez Castillo saw Plaintiff approach from behind
17 her with his arm extended towards her bottom and watched as Plaintiff grabbed her
18 bottom for a brief moment before Ms. Hernandez Cruz stood up. *Id.* at 235-36.
19 Mr. Ramirez Castillo added that the pathway was clear and that “there was no way
20 [Plaintiff] could have stumbled.” *Id.* at 246.

1 In his deposition, Mr. Ramirez Castillo recalled Ms. Hernandez Cruz asking,
2 “What are you doing? That is unacceptable.” ECF No. 55-1 at 236. Plaintiff
3 allegedly replied, “Oh, I’m sorry. I’m just kidding,” and added something to the
4 effect of “Man, no one can take a joke.” *Id.* at 236-37. In an earlier written
5 statement, Mr. Ramirez Castillo testified that Plaintiff had grabbed Ms. Hernandez
6 Cruz’s bottom hip and said he “[couldn’t] wait to go one-on-one” with Ms.
7 Hernandez Cruz as he grabbed her. *Id.* at 244. During his deposition, however,
8 Mr. Ramirez Castillo testified that he could not recall whether Plaintiff said he
9 wanted to go one-on-one with her or not. *Id.* He further clarified that, in writing
10 that Plaintiff had grabbed her “bottom hip,” he meant Plaintiff grabbed Ms.
11 Hernandez Cruz’s buttocks, not her lower hip. *Id.*

12 Mr. Tamez also claimed to have witnessed the incident. ECF No. 55-1 at
13 287. Mr. Tamez stated that he watched Plaintiff stumble and hold his arms in front
14 of him, bracing himself on the back of Ms. Hernandez Cruz. *Id.* Mr. Tamez saw
15 Mr. Gratton hold his arms up as Ms. Hernandez Cruz turned around, but was too
16 far away to hear their conversation. *Id.* He wrote, “What I witnessed was most
17 certainly an accident.” *Id.*

18 Ms. Hernandez Cruz reported the contact to Mr. Fromherz the day it
19 occurred. ECF No. 55-1 at 239. That same day, Mr. Fromherz collected Mr.
20 Ramirez Castillo from the loading center to verify the incident and take a

1 statement. *Id.* at 240. Mr. Fromherz provided Ms. Hernandez Cruz and Mr.
2 Ramirez Castillo with Defendant's EthicsPoint phone number, which both
3 individuals called. ECF Nos. 55-1 at 230; 68-1 at 154; 68-6 at 89.

4 EthicsPoint referred the matter to security supervisor Ryan Wiedenmeyer for
5 investigation. ECF No. 55-1 at 269. Mr. Wiedenmeyer spoke with all involved
6 parties, including Plaintiff and Mr. Fromherz. *Id.* at 273. At the time of his
7 interview, Plaintiff did not identify Mr. Tamez as a potential witness. *Id.* at 280-
8 81; ECF No. 68-6 at 107-108. Two other unnamed witnesses were also identified
9 after the fact by Mr. Fromherz. ECF No. 68-6 at 118-19. Mr. Wiedenmeyer did
10 not have the opportunity to interview these three persons before submitting his
11 report. *Id.*

12 Based on the information provided by both parties during the investigation,
13 Mr. Wiedenmeyer concluded that "it seemed more that it was a touch versus
14 someone falling into someone" and that there had been some deliberate "unwanted
15 physical contact." ECF Nos. 55-1 at 274; 68-6 at 110. However, he determined
16 that the statements which Mr. Ramirez Castillo alleged Plaintiff had made
17 regarding wanting to "go one-on-one" with Ms. Hernandez Cruz were
18 unsubstantiated. ECF No. 68-6 at 110. Prior to this incident, Mr. Wiedenmeyer
19 had not investigated a claim at the Yakima center. ECF No. 55-1 at 272. Mr.
20 Wiedenmeyer was also unaware of Plaintiff's prior allegations of racial bias. *Id.* at

1 279. The parties' statements and Mr. Wiedenmeyer's findings were sent to Mr.
2 Leyert on October 27. ECF No. 68-6 at 119-20.

3 Mr. Leyert and his supervisor determined that Plaintiff had engaged in
4 unprovoked assault in violation of Article 28, Section 2(a)(5) of the Supplement to
5 the CBA. ECF No. 55-1 at 206, 211-12. Article 28 allows for an employee to be
6 discharged without a warning letter for unprovoked assault. *Id.* at 526. Per UPS
7 policy, the letter was signed by Mr. Loomis as the center manager, who forwarded
8 it to Plaintiff on October 27. *Id.* at 210; ECF No. 52-2 at 164. However,
9 Defendant claims that only Mr. Leyert and his supervisor had the authority to
10 terminate Plaintiff's employment. ECF No. 53 at 10.

11 Plaintiff filed a grievance that same day, asserting that he was "wrongful[ly]
12 terminat[ed]." ECF No. 55-1 at 103. Plaintiff also filed a second grievance that
13 day, stating that he was "falsely accused [of] inappropriate behavior in the
14 workplace." *Id.* at 105. Pursuant to Defendant's policy, both a center-level
15 hearing and a panel-level hearing were held, at which Plaintiff defended his
16 innocence, but did not mention whether he believed his termination was on account
17 of racial bias. ECF Nos. 54 at 12, ¶ 55; 55-1 at 35. Plaintiff now asserts that the
18 reason for his firing was pretextual and motivated by racial animus. He argues that
19 this is evidenced by the fact that Mr. Leyert submitted a draft termination letter in
20 the Workday program before Mr. Wiedenmeyer's investigation was complete.

1 ECF No. 55-1 at 209. Mr. Leyert, however, testified that he regularly drafted
2 letters in the Workday system before an investigation was complete or the letters
3 were sent out. *Id.* at 208. Plaintiff also alleges that Defendant failed to respond
4 allegations of sexual harassment against white male employees similarly. ECF
5 Nos. 67 at 20; 68-1 at 150-51.

6 On October 18, 2022, around one year after his termination, Plaintiff filed a
7 lawsuit against Defendant in this Court. ECF No. 1. By amended complaint,
8 Plaintiff alleged he was subject to discrimination, a hostile work environment, and
9 retaliation in violation of 42 U.S.C. § 1981, the Washington Law Against
10 Discrimination (WLAD), and Washington's wrongful discharge in violation of
11 public policy tort. *See* ECF No. 18 at 2, ¶2.

12 DISCUSSION

13 I. Summary Judgment Standard

14 A court may grant summary judgment in favor of a moving party who
15 demonstrates "that there is no genuine dispute as to any material fact and that the
16 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In ruling
17 on a motion for summary judgment, the court must only consider admissible
18 evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).
19 The party moving for summary judgment bears the initial burden of showing the
20 absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S.

1 317, 323 (1986). The burden then shifts to the non-moving party to identify
2 specific facts showing there is a genuine issue of material fact. *See Anderson v.*
3 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla
4 of evidence in support of the plaintiff’s position will be insufficient; there must be
5 evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

6 For purposes of summary judgment, a fact is “material” if it might affect the
7 outcome of the suit under the governing law. *Id.* at 248. Further, a dispute is
8 “genuine” only where the evidence is such that a reasonable jury could find in
9 favor of the non-moving party. *Id.* The court views the facts, and all rational
10 inferences therefrom, in the light most favorable to the non-moving party. *Scott v.*
11 *Harris*, 550 U.S. 372, 378 (2007). Summary judgment will thus be granted
12 “against a party who fails to make a showing sufficient to establish the existence of
13 an element essential to that party’s case, and on which that party will bear the
14 burden of proof at trial.” *Celotex*, 477 U.S. at 322.

15 On cross-motions for summary judgment “both parties asserting that there
16 are no uncontested issues of material fact[] does not vitiate the court’s
17 responsibility to determine whether disputed issues of material fact are present.”
18 *Fair Housing Council of Riverside Cnty, Inc. v. Riverside Two*, 249 F.3d 1132,
19 1136 (9th Cir. 2001) (quoting *United States v. Fred A. Arnold, Inc.*, 573 F.2d 605,
20 606 (9th Cir. 1978)). Moreover, the court must consider each motion on its own

1 merits. *Id.* at 1134 (“[W]hen simultaneous cross-motions for summary judgment
2 on the same claim are before the court, the court must consider the appropriate
3 evidentiary material identified and submitted in support of both motions, and in
4 opposition to both motions, before ruling on each of them.”). However, where
5 motions for summary judgment center around the same dispositive issue, a court
6 need not organize its discussion of the cross-motions into separate sections.

7 *Tulalip Tribes of Washington v. Washington*, 783 F.3d 1151, 1156 (9th Cir. 2015);
8 *see also, e.g., Acosta v. City Nat'l Corp.*, 922 F.3d 880, 890 (9th Cir. 2019)
9 (determining that where two motions for summary judgment center around the
10 same central legal issue and one party has the same burden of proof under
11 substantive law in both motions, granting one party’s motion compels denial of the
12 other party’s motion).

13 **II. Gateway Issues**

14 The parties move for summary judgment on the statute of limitations,
15 preemption, and waiver and estoppel issues. Because a decision on each of these
16 matters has the potential to be dispositive of Plaintiff’s other claims, the Court
17 addresses them first.²

19 ² As an initial matter, Plaintiff also claims that Defendant’s response to his
20 interrogatory asking Defendant to identify the factual bases for its affirmative

1 **A. Statute of Limitations**

2 Plaintiff seeks to dismiss Defendant's affirmative defenses of statute of
3 limitations, timeliness, and laches.³ ECF No. 52 at 13. Defendant opposes the
4 motion and brings a cross-motion for summary judgment on the statute of
5 limitations issue. ECF Nos. 63 at 9; 53 at 11.

6 Defendant agrees that Plaintiff's claims based on his 2021 termination are
7 timely, but contends that any claim for any event occurring prior to October 18,
8 2018, is barred by the statute of limitations. ECF No. 63 at 9. Therefore,

9
10 defenses are lacking. ECF No. 52 at 8-9. Defendant supplemented its response to
11 this interrogatory on June 30, 2023, with a factual statement of events it believed
12 supported its defenses. ECF No. 63 at 3. The Court does not find anything further
13 is required. Separately, Defendant concedes that its thirteenth affirmative defense
14 (failure to exhaust administrative remedies) should be dismissed. ECF No. 63 at
15 13. The Court accepts Defendant's concession and dismisses the exhaustion
16 defense.

17 ³ Defendant did not respond to Plaintiff's argument that its affirmative
18 defense of laches was barred. *Compare* ECF No. 52 at 13-14 (discussing the
19 defense of laches) *with* ECF No. 63. Accordingly, the Court dismisses the defense
20 of laches. *See Bowen v. Oistead*, 125 F.3d 800, 806 (9th Cir. 1997).

1 Defendant argues, Plaintiff cannot base his claims on the following actions: (1) Mr.
2 O'Rourke allegedly referring Plaintiff as "boy" in April 2018; (2) Mr. Fromherz
3 allegedly swearing at Plaintiff in May 2018; (3) Plaintiff being laid off as a cover
4 driver, which ended when he won the mall route bid on October 10, 2018; and (4)
5 any other alleged comments or actions taken by Mr. Fromherz or Mr. Loomis prior
6 to October 2018. ECF No. 53 at 11. Plaintiff responds that his claims accrued
7 during the statutory period and that "[p]atterns of racial hostility, discrimination
8 and retaliation began in 2018 and continued for years, culminating in [his]
9 termination." ECF No. 70 at 6. Defendant presses that Plaintiff misapplies the
10 continuing violations doctrine, and that Plaintiff cannot rely on discrete acts
11 predating October 18, 2018 to prove his claims. ECF No. 73 at 4-5.

12 The statute of limitations for WLAD and related state law tort claims is three
13 years. *Arthur v. Whitman Cnty.*, 24 F. Supp. 3d 1024, 1028 (E.D. Wash. 2014)
14 (citing *Antonius v. King Cnty.*, 153 Wash.2d 256, 261-62 (2004)); *see also* RCW
15 4.16.080. The statute of limitations for bringing a claim under Section 1981,
16 respectively, is four years. *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1003
17 (9th Cir. 2011). Discrete acts of discrimination and retaliation occurring outside
18 the statute of limitations period may be time barred, even if they relate to acts
19 alleged in timely filed charges. *Broyles v. Thurston Cnty.*, 147 Wash. App. 409,
20

1 432 (2008); *see also Shah v. Cnty. of Los Angeles*, 399 F. App'x 305, 306 (9th Cir.
2 2010).

3 However, acts that are otherwise time-barred may be admissible as evidence
4 of a hostile work environment even if they are not independently admissible to
5 support a claim for discrimination or retaliation. *See Diemert v. City of Seattle*, ---
6 F. Supp. 3d ----, 2023 WL 5530009, at *7 (W.D. Wash. Aug. 28, 2023); *see also*
7 *Broyles*, 147 Wash. App. at 434 (“In sum, a plaintiff with a hostile work
8 environment claim may not use that claim to seek damages for a discrete
9 discriminatory act that is time barred but, if otherwise admissible, may use that
10 discrete act as background information if it tends to support a hostile work
11 environment claim.”). A hostile work environment claim “will not be time barred
12 so long as all acts which constitute the claim are part of the same unlawful
13 employment practice and at least one act falls within the time period.” *Nat'l R.R.*
14 *Corp. v. Morgan*, 536 U.S. 101, 122 (2002); *see also Story v. Napolitano*, 771
15 F.Supp.2d 1234, 1246 (9th Cir. 2011) (explaining that the continuing violations
16 doctrine applies to Section 1981 hostile work environment claims “involving
17 related acts that collectively constitute a single unlawful employment practice”).

18 Plaintiff filed suit in this case on October 18, 2022. Therefore, as Defendant
19 notes, discrete acts supporting his discrimination and retaliation claims under
20 WLAD and the tort of wrongful discharge in violation of public policy may only

1 reach as far back as October 18, 2019, due to the three-year statute of limitations
2 period. Similarly, evidence of any discrete acts supporting Plaintiff's
3 discrimination and retaliation claims under Section 1981 may only reach as far
4 back as October 18, 2018, due to the four-year statute of limitations period. As
5 such, Plaintiff may not rely on evidence predating October 18, 2018.

6 However, evidence predating October 18, 2018, may be used to support
7 Plaintiff's claim of a hostile work environment. Defendant contends that the acts
8 prior to October 2018 "involved different actors, are drastically different in nature,
9 and occurred over two years before any timely alleged harassing act." ECF No. 73
10 at 5. The Court disagrees. The acts prior to October 2018 involved the same
11 primary persons—Mr. O'Rourke, Mr. Fromherz, and Mr. Loomis—as those
12 involved after the fact in allegedly assigning Plaintiff to less desirable routes,
13 overloading Plaintiff with work and making his job more difficult, denying
14 Plaintiff his wages and bonuses, and attempting to uncover unfavorable
15 information about Plaintiff from other employees. Accordingly, the Court will
16 allow Plaintiff to introduce evidence of acts predating October 18, 2018 to support
17 his claim of a hostile work environment.

18 **B. Preemption**

19 Plaintiff seeks to dismiss the affirmative defense of preemption. ECF No.
20 52 at 16-17. Defendant moves for summary judgment on the same issue. ECF No.

1 53 at 22-26.

2 Plaintiff asserts that this Court already rejected Defendant's preemption
3 arguments in ruling on Plaintiff's motion to compel. ECF No. 52 at 16-17. In that
4 Order, the Court wrote:

5 Defendant presses that Plaintiff's discovery request is preempted to the
6 extent that it implicates his [WLAD] claim. Specifically, Defendant
7 argues that because the state law claim is dependent upon the meaning
of terms contained [within the CBA], it is preempted under § 301 of the
Labor Management Relations Act of 1947 (LMRA).

8 The Court rejects this contention. Plaintiff's complaint alleges
9 unlawful employment practices and unlawful termination for engaging
10 in protected activity under WLAD. “[T]he Ninth Circuit has
11 specifically held that rights established by the WLAD are non-
negotiable and separate from a CBA.” *Sellar v. Woodland Park*
Zoological Soc'y, 2:23-cv-00627-TL, 2023 5425490, at *4 (W.D.
12 Wash. Aug. 23, 2023); *see also McFarland v. BNSF Ry. Co.*, 4:16-cv-
13 5024-EFS, 2016 WL 10515857, at *3 (E.D. Wash. May 5, 2016)
(unreported) (wrongful discharge claim from engagement in protected
14 activity is a substantive protection under Washington tort law, separate
from any rights provided by the CBA). Accordingly, the Court will not
entertain Defendant's argument that Plaintiff's WLAD claim and
related motion to compel is preempted or otherwise null.

15 ECF No. 27 at 8-9.

16 Defendant responds that this analysis was not dispositive of its preemption
17 arguments because (1) the holding was in the context of a motion to compel and
18 therefore could not have addressed the merits of the defense on a full evidentiary
19 record, and (2) the discovery ruling only referenced preemption under the LMRA,

20

1 whereas here Defendant also argues that the *Garmon* doctrine divests the Court of
2 jurisdiction. ECF Nos. 63 at 7-8; 53 at 22-26.

3 Defendant's claim that the earlier LMRA analysis does not control is
4 tenuous because the issue before the Court on the motion to compel was a legal
5 one that could be resolved without further evidence. However, the outcome would
6 not change even if the Court were to find that its earlier analysis was not
7 dispositive. Defendant asserts that Plaintiff's claims are preempted because “[t]he
8 essence of his claim . . . is that UPS misapplied the CBA term ‘unprovoked
9 assault’ by either interpreting this term unfairly or in a discriminatory way, or
10 otherwise breached very specific CBA provisions related to pay, seniority, and
11 routes.” ECF No. 53 at 23-24. Defendant adds, “[I]t cannot be that UPS complied
12 with the CBA in all regards, as governed by the National Labor Relations Act
13 amended by the LMRA, but acted improperly under a different law.” *Id.* at 24.

14 It stretches the allegations of the amended complaint too far to characterize
15 Plaintiff's claims as mere hairsplitting over the meaning of a CBA-specific term.
16 Plaintiff does not argue that he was fired because Defendant misinterpreted the
17 meaning of “unprovoked assault” under Article 28; instead, he asserts that
18 Defendant manufactured a claim of sexual assault as a pretext for firing him due to
19 racial biases. At core, Plaintiff's claims are that Defendant unlawfully
20 discriminated against him on the basis of race under WLAD, state tort law, and

1 Section 1981. The Court declines to recast those claims into CBA-specific
2 arguments simply because Plaintiff took advantage of Defendant's grievance
3 process. Therefore, Plaintiff's allegations are not preempted by Section 301 of
4 LMRA.

5 Defendant's contentions about the *Garmon* doctrine are likewise misplaced.
6 Defendant says that *Garmon* bars Plaintiff's retaliation claim to the extent that
7 those claim is based "on filing grievances, the unfair application of the CBA, or
8 any other labor-related aspect of his employment." ECF No. 53 at 25. Defendant
9 notes that one of Plaintiff's grievances explicitly stated that Plaintiff believed he
10 was being retaliated against for his role as shop steward of the Union. ECF No. 63
11 at 8. It is true that one sentence mentioned his role as shop steward, but Plaintiff is
12 not relying on that specific passage to establish his retaliation claim. Plaintiff's
13 retaliation claim is instead grounded in the allegation that Defendant racially
14 discriminated against him, which was also a focal point of multiple grievances.
15 Accordingly, Defendant's preemption defenses are dismissed.

16 **C. Waiver & Estoppel**

17 Plaintiff next moves to dismiss the affirmative defenses of waiver and
18 estoppel. ECF No. 52 at 14. Defendant did not address the issue of waiver;
19 therefore, the Court dismisses that defense. *Bowen*, 125 F.3d at 806.
20

1 On the issue of estoppel, Defendant argues that Plaintiff is estopped from
2 bringing claims based on the subject matter of a grievance which has formally
3 settled, and that it has resolved many of Plaintiff's pay-related claims internally.
4 ECF No. 63 at 10. Even if Plaintiff's wage-related grievances were resolved,
5 Plaintiff's complaints about compensation are peripheral to his allegations of racial
6 discrimination. In other words, Defendant did not settle Plaintiff's claims of racial
7 bias in the workplace through the grievance process. Accordingly, Plaintiff is not
8 estopped from bringing his claims.

9 **III. Discrimination Claims**

10 Defendant moves for summary judgment on Plaintiff's WLAD and Section
11 1981 discrimination claims. ECF No. 53 at 11-17. Defendant argues that
12 Plaintiff's discrimination claims fail because (1) Plaintiff did not establish a *prima*
13 *facie* case of discrimination; (2) Defendant identified legitimate, nondiscriminatory
14 reasons for each alleged act of discrimination it took; and (3) the evidence does not
15 show pretext. *Id.* The Court agrees and finds that Plaintiff has not established a
16 *prima facie* case of discrimination.

17 Section 1981 claims and state law employment discrimination claims are
18 analyzed under the *McDonnell Douglas* burden-shifting framework. *Weil v.*
19 *Citizens Telecom Servs. Co., LLC*, 922 F.3d 993, 1002 (9th Cir. 2019) (citing
20 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Under the

1 *McDonnell Douglas* framework, the plaintiff bears the initial burden of
2 establishing a prima facie case of discrimination. *Surrell v. Cal. Water Serv. Co.*,
3 518 F.3d 1097, 1106 (9th Cir. 2008). If the plaintiff establishes a prima facie case,
4 then the defendant must articulate a non-discriminatory reason for its actions.
5 *Lindsey v. SLTLA, LLC*, 447 F.3d 1138, 1144 (9th Cir. 2006). If the defendant
6 satisfies its burden, then the burden shifts back to plaintiff to demonstrate that the
7 reason identified by defendant was mere pretext for discrimination. *Id.*

8 To stake a successful prima facie case of racial discrimination under Section
9 1981, plaintiffs must show “(1) that they are members of a protected class; (2) that
10 they were qualified for their positions and performing their jobs satisfactorily; (3)
11 that they experienced adverse employment actions; and (4) that ‘similarly situated
12 individuals outside their protected class were treated more favorably, or other
13 circumstances surrounding the adverse employment action give rise to an inference
14 of discrimination.’” *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1156 (9th Cir.
15 2010) (quoting *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir.
16 2004)). Similarly, WLAD requires plaintiffs to show that they “(1) belong to a
17 protected class, (2) [were] treated less favorably in the terms or conditions of their
18 employment (3) than a similarly situated, nonprotected employee, and (4) the
19 nonprotected ‘comparator’ employee does substantially the same work.” *Smith v.*
20 *City of Seattle*, No. 84351-6-I, 2023 WL 8372399, at *5 (Wash. Ct. App. Dec. 4,

1 2023) (citations omitted). The showing is minimal and does not need to rise to the
2 level of a preponderance of the evidence. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885,
3 889 (9th Cir. 1994).

4 To establish that similarly situated individuals outside the protected class
5 were treated more favorably under the fourth *Hawn* factor, a plaintiff needs to
6 identify a white comparator to whom he was “similarly situated in all material
7 respects.” *Weil*, 922 F.3d at 1004 (quoting *Moran v. Selig*, 447 F.3d 748, 755 (9th
8 Cir. 2006)). Employees are materially similar when they have “similar jobs and
9 display similar conduct.” *Id.* (quoting *Vasquez v. Cnty. of Los Angeles*, 349 F.3d
10 634, 641 (9th Cir. 2003)).

11 Defendant alleges that Plaintiff has not made a successful prima facie
12 showing of discrimination under either Section 1981 or WLAD because Plaintiff
13 failed to identify any similarly situated white employee other than Mike
14 Summerville, whom he alleged was allowed to count individual packages towards
15 his production bonus. ECF No. 53 at 12. Relatedly, Defendant claims that
16 Plaintiff has failed to identify a single specific white driver who had their workload
17 reduced while Plaintiff’s load was increased or was not disciplined for dress code
18 infractions. *Id.* at 13.

19 Plaintiff responds that he is not obligated to show that similarly situated
20 white employees were treated more favorably because the test allows him to

1 produce evidence of either similarly situated employees *or* “other circumstances
2 surrounding the adverse employment action [which] give rise to an inference of
3 discrimination.” *Hawn*, 615 F.3d at 1156; ECF No. 66 at 21. He notes that both
4 Mr. Loomis and Mr. Fromherz attempted to deny him work and fire him, and that
5 Mr. Loomis did not take corrective action when Mr. Peterson allegedly referred to
6 him using a racial epithet. ECF No. 66 at 21.

7 Plaintiff is technically correct that he is not required to submit comparator
8 evidence under *Hawn*. But while the test does allow Plaintiff to choose between
9 bringing comparator evidence or evidence of other circumstances surrounding the
10 adverse employment action, the Ninth Circuit has explained that a district court
11 may properly focus on the question of comparator evidence when a plaintiff’s
12 action “sounds in disparate treatment and seeks to raise an inference of
13 discrimination based solely on circumstantial evidence” and the comparison “is
14 central to plaintiff’s case.” *Hawn*, 615 F.3d at 1156-57.

15 It is apparent from the face of the amended complaint and supportive
16 pleadings that Plaintiff’s case is based on his alleged disparate treatment. ECF No.
17 66 at 20 (alleging he suffered disparate treatment). Plaintiff claims that he was
18 denied work opportunities, assignments, and bonuses given to white employees,
19 forced to assist white drivers with their loads, and singled out and written up for
20 minor infractions while white employees were not. *See* ECF No. 18 at 2, ¶ 2; 66 at

1 21-22. Other black employees offered similar testimony. *See supra* Background
2 II.

3 Plaintiff has not offered comparator evidence which would satisfy his
4 burden to establish a *prima facie* case of discrimination. Despite claiming that he
5 received less favorable treatment than other white employees, Plaintiff did not
6 identify any specific similarly situated white employees who received more work
7 than him, were assigned better routes than him, or required his assistance
8 delivering their misloads. Plaintiff mentions by name Mr. Summerville, whom he
9 alleges was given a bonus with respect to his production quota, but Defendant
10 introduced evidence that Mr. Summerville was also apprehended for his
11 miscalculation and not compensated on a package-by-package basis. ECF No. 73
12 at 7; *see also Nelson v. Pima Cnty. Coll.*, 83 F.3d 1075, 1081-82 (9th Cir. 1996)
13 (“[M]ere allegation and speculation do not create a factual dispute for purposes of
14 summary judgment.”).

15 Likewise, Plaintiff has not shown to the Court’s satisfaction that he was
16 singled out for dress code or other minor infractions on a more frequent basis than
17 his white peers: Plaintiff offers his disciplinary log into evidence, but fails to
18 provide comparable documentation or evidence beyond mere speculation regarding
19 his supervisors’ treatment of white employees who committed similar infractions.
20 Ms. Reyes declared that Doug Shively and Dennis Forbes were two white drivers

1 who frequently took too long on their routes and were not criticized like Plaintiff.
2 ECF No. 68-1 at 5-6, ¶ 11. However, the Court lacks information as to the
3 similarity of Plaintiff and these drivers: the record is not clear as to these drivers'
4 routes or seniority, and there is no disciplinary record available which confirms
5 whether or not that they were in fact not scolded by Mr. Loomis or Mr. Fromherz.
6 *See id.* (Ms. Reyes conjecturing that supervisors did not criticize Mr. Shively and
7 Mr. Forbes "as far as *I* know") (emphasis added).

8 Plaintiff also provides the testimony of Mr. Anderson, a black employee
9 who alleges he was asked to cut his hair while Grant Ellsworth—a white employee
10 who also had long hair—was not. Even if true, this does not show that Defendant
11 discriminated against Plaintiff specifically for his tattoos, nor is there sufficient
12 information in the record to establish that Plaintiff and Mr. Ellsworth were
13 similarly situated. Therefore, Plaintiff has not proved a *prima facie* case of
14 discrimination, and summary judgment is granted to Defendant on this issue.

15 **IV. Hostile Work Environment Claims**

16 Defendant moves for summary judgment on Plaintiff's hostile work
17 environment claims. ECF No. 53 at 17-18. To prevail on a hostile work
18 environment claim, Plaintiff must show that (1) he was subjected to verbal or
19 physical conduct of a racial nature; (2) the conduct was unwelcome; and (3) the
20 conduct was sufficiently severe or pervasive to alter the conditions of his

1 employment and create an abusive work environment. *Vasquez*, 349 F.3d at 642.
2 To resolve a hostile work environment claim, the court will consider all
3 circumstances, “including the frequency of the allegedly discriminatory conduct,
4 its severity, and whether it unreasonably interferes with an employee’s work
5 performance.” *Surrell*, 518 F.3d at 1109 (citing *Brooks v. City of San Mateo*, 229
6 F.3d 917, 923 (9th Cir. 2000)). Generally, “simple teasing, offhand comments, and
7 isolated incidents (unless extremely serious) will not amount to discriminatory
8 changes in the ‘terms and conditions of employment.’” *Faragher v. Boca Raton*,
9 524 U.S. 775, 786 (1998). However, an employer may create a hostile work
10 environment “by failing to take immediate and corrective action in response to a
11 coworker’s or third party’s sexual harassment or racial discrimination the employer
12 knew or should have known about.” *Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643,
13 647 (9th Cir. 2021).

14 Defendant argues that Plaintiff has not raised a triable issue on his hostile
15 work environment claim because the allegations of racism he refers to are neither
16 severe nor pervasive enough. ECF Nos. 53 at 18-21; 73 at 9-10. Plaintiff responds
17 that he only need show whether the conduct was severe “or” pervasive, not both,
18 and that such questions are better reserved to the trier-of-fact. ECF No. 66 at 22.

19 The Court recounts the verbal acts of discrimination which are alleged to
20 have contributed to a hostile work environment. In spring 2018, Mr. O’Rourke

1 referred to Plaintiff as “boy” while on a ride-along with him.⁴ Mr. O’Rourke did
2 not stop when Plaintiff asked him to, but did not repeat the remark after his
3 conversation with Mr. Loomis. Later that spring, Mr. Fromherz, a friend of Mr.
4 O’Rourke’s, allegedly told Plaintiff he had not “acted like a man” and yelled at
5 him to leave when he came into the facility on a day off. When Plaintiff reported
6 this to Mr. Loomis, he failed to take any corrective action. Similarly, at some
7 undated point in time, another employee reported a different supervisor refer to
8 Plaintiff using a racial epithet and other expletives. Mr. Loomis again failed to
9 take any corrective action.

10 “The required severity for harassing conduct varies inversely with the
11 pervasiveness or frequency of the conduct.” *Fried*, 18 F.4th at 649 (internal
12 quotations and citations omitted). Thus, denigrating comments do not create a
13 hostile work environment when made on only one or several occasions several
14 weeks or months apart. *Id.* Some examples are illuminating. In *Swinton*, the
15 Ninth Circuit affirmed a jury finding that the plaintiff’s employer had created a
16 hostile work environment. *Swinton v. Potomac Corp.*, 270 F.3d 794, 799 (9th Cir.
17 2001). A supervisor within the department “regularly” told racial “jokes” and used
18

19 ⁴ As mentioned, for his hostile work environment claims, Plaintiff may rely
20 on evidence outside the limitations period.

1 racial slurs in front of the plaintiff and plaintiff's peers. *Id.* Plaintiff's co-workers
2 also told racially offensive jokes and referred to plaintiff using racist language. *Id.*
3 at 799-800. The Ninth Circuit had little trouble affirming the jury's conclusion
4 that the defendant employer had created a hostile work environment by engaging
5 in a pattern of making racist comments. *Id.* at 807. By contrast, in *Vasquez*, the
6 court found the plaintiff had not stated an actionable hostile work environment
7 claim where he only recited a few instances of his supervisors making racial
8 remarks about Hispanics, several months apart, and apparently one supervisor
9 made a negative remark about him in front of youth at the juvenile detention center
10 plaintiff worked at. 349 F.3d at 643. *See also, e.g., Manatt v. Bank of America,*
11 *NA*, 339 F.3d 792, 795 (9th Cir. 2003) (finding no claim for hostile work
12 environment where plaintiff, who was Asian, observed her coworkers pull their
13 eyes back and refer to her as "China woman" on two separate occasions).

14 For summary judgment purposes, the Court assumes Defendant's
15 supervisors in fact made the abovementioned remarks in reference to Plaintiff.
16 Nonetheless, the Court does not find that Defendant's statements created an
17 actionable claim for a hostile work environment. While it goes without saying that
18 such comments have no place in a professional setting or any other civilized
19 environment, they were dispersed in time and only occurred on a handful of
20 occasions. *Compare Lyzer v. Caruso Produce, Inc.*, 3:17-cv-1335-SB, 2019 WL

1 5960655, at *2 (D. Or. Nov. 13, 2019) (declining to grant summary judgment to
2 defendant-employer on hostile work environment claim where plaintiff's white co-
3 workers and supervisors repeatedly called him "boy," referred to him using the n-
4 word, and "joked" that they were going to physically beat him). Moreover,
5 Plaintiff did not have personal knowledge of Mr. Peterson's comments to Mr.
6 Tamez. Accordingly, the comments are insufficiently severe or pervasive for
7 Plaintiff to prevail on his hostile work environment claims.

8 **V. Retaliation Claims**

9 Defendant moves for summary judgment on Plaintiff's WLAD and Section
10 1981 retaliation claims. A claim for retaliation uses the same *McDonnell Douglas*
11 burden-shifting approach as a claim for discrimination. *Surrell*, 518 F.3d at 1105.
12 To establish a prima facie case of retaliation, a plaintiff must prove (1) he engaged
13 in a protected activity; (2) he suffered an adverse employment action; and (3) there
14 was a causal connection between the two. *Id.* at 1108. "Protected activity includes
15 the filing of a charge or a complaint, or providing testimony regarding an
16 employer's alleged unlawful practices, as well as engaging in other activity
17 intended to 'oppose' an employer's discriminatory practices." *Raad v. Fairbanks*
18 *N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (quoting 42
19 U.S.C. § 2000e-3(a)), *amended on denial of reh'g*, No. 00-35999, 2003 WL
20 21027351 (9th Cir. May 8, 2003). Further, "the plaintiff must make some showing

1 sufficient for a reasonable trier of fact to infer that the defendant was aware that the
2 plaintiff had engaged in protected activity.” *Id.* (citing *Cohen v. Fred Meyer, Inc.*,
3 686 F.2d 793, 796 (9th Cir. 1982)). A causal connection may be “inferred from
4 circumstantial evidence such as the employer’s knowledge of the protected
5 activities and the proximity in time between the protected activity and the adverse
6 action.” *Dawson v. Entek Intern.*, 630 F.3d 928, 936 (9th Cir. 2011). An
7 employment action is adverse if it “materially affect[s] [the] compensation, terms,
8 conditions, or privileges of employment,” and is “based on retaliatory motive and
9 is reasonably likely to deter the charging party or others from engaging a protected
10 activity.” *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 970 (9th Cir. 2002)
11 (internal quotations and citations omitted).

12 The Court finds Plaintiff engaged in the following protected activity within
13 the relevant limitations period:

- 14 1. Filing an EEOC charge on October 19, 2018;
- 15 2. Filing a Union grievance on June 11, 2020 regarding Mr.
16 Loomis’s treatment of Mr. Summerville versus Plaintiff with
respect to production quotas;
- 17 3. Filing a Union grievance on January 20, 2021 regarding alleged
18 harassment and retaliation by Mr. Loomis; and
- 19 4. Filing a Union grievance on September 8, 2021 regarding alleged
favoritism by Yakima center management.

1 *See* ECF Nos. 55-2 at 62; 55-1 at 85, 97, 101.⁵

2 Defendant argues that, of these, only the October 19, 2018 EEOC charge and
3 second June 11, 2020 grievance regarding Plaintiff's production quota constitutes
4 protected activity. ECF No. 53 at 20. Specifically, Defendant claims that the other
5 grievances cannot constitute protected activity because they "had nothing to do
6 with race." ECF No. 53 at 20. The Court disagrees. Plaintiff's January 2021
7 grievance alleged that he was subject to "continuous harassment and retaliation
8 from Center Manager Erik Loomis," who had "gone out of his way to make my job
9 harder than it has to be in any event [by] overloading my route, giving me a worse
10 truck, and instructing supervisors to comply with his malicious efforts to retaliate
11 against me." ECF No. 55-1 at 97. In the fact section, Plaintiff wrote:

12 Favoritism – I'm the only bid route driver to whom Erik takes my
13 assigned truck away from and time . . . Also my route is constantly
14 overloaded to make routes lighter for the people he likes. Retaliation
– Being shop steward Erik Loomis retaliates against me because of
other drivers grievances.

15
16

⁵ Notably, the EEOC document—which was filed within the limitations
17 period—references events *outside* the limitations period. Therefore, while the
18 EEOC document itself may come in as evidence of Plaintiff engaging in protected
19 activity, Plaintiff may not rely upon evidence of the discrete acts mentioned within
20 that document to prove his retaliation and discrimination claims.

1 ECF No. 55-1 at 98 (capitalization and spelling altered for readability).

2 Defendant offers that these statements cannot constitute protected activity
3 because the alleged retaliation was due to Plaintiff's status as a shop steward, not a
4 black man, and because Plaintiff did not explicitly mention Mr. Loomis favored
5 white drivers. ECF Nos. 53 at 20; 54 at 8-9, ¶ 38. This mischaracterizes the
6 background animating these grievances. Plaintiff and others testified he was
7 retaliated against for assisting other black drivers with their grievances, many of
8 which were race-based. *See, e.g.*, ECF No. 52-2 at 52, ¶ 20 ("[Plaintiff] also
9 helped other employees to understand their rights and bring issues forward when
10 needed. In particular, [Plaintiff] was helping to advocate for other black drivers
11 when we weren't being treated fairly."). Moreover, there is room for reasonable
12 debate as to whether Mr. Loomis's alleged "favoritism" of other drivers meant he
13 favored other white drivers, particularly in light of the fact that Plaintiff was
14 alleging "continuous harassment" by Mr. Loomis and that Plaintiff's earlier June
15 11, 2020 complaint alleged that Loomis discriminated against him and had an
16 "overly negative and prejudiced" attitude toward black employees. ECF No. 55-1
17 at 85. Therefore, viewing the facts in the light most favorable to Plaintiff, the
18 January 20 grievance constitutes protected activity.

19 Similarly, Defendant represents that the September 2021 document should
20 be excluded. ECF No. 54 at 8-9, ¶ 38. In that grievance, Plaintiff complained of:

1 Constant favoritism in our center for drivers that management “likes.”
2 My route has also been constantly manipulated to make me look like a
3 slow driver. When I requested my route to be made more efficiently,
4 I then was intimidated with a ride along in which that was the only
5 day my route was made efficient to accommodate the managers shift
6 to be off by 5:30 p.m.

5 ECF No. 55-1 at 101 (capitalization and spelling altered for readability).

6 Again, given the broader context of allegations within which this grievance
7 fits, the complaint easily qualifies as protected activity. Therefore, the Court
8 proceeds to consider whether there was some adverse action by Defendant.

9 Defendant admits that Plaintiff's termination qualifies as a materially
10 adverse action, but argues that Plaintiff cannot raise a genuine issue of material
11 fact to support the inference of causation. ECF No. 53 at 21. First, Defendant
12 argues that there is too wide of a gap between Plaintiff's protected activity and the
13 alleged adverse action. *Id.* However, that argument is foreclosed by the fact that
14 Plaintiff's last grievance was filed in September 2021, approximately one month
15 before his termination.

16 Next, Defendant argues that Plaintiff cannot raise a triable issue as to
17 whether Mr. Leyert or Mr. Wiedenmeyer had any knowledge of his protected
18 activity so as to establish pretext. ECF No. 53 at 21; *see also Raad*, 323 F.3d at
19 1197 (“In order to prevail, [plaintiff] must present evidence from which a
20 reasonable trier of fact could conclude that the [officials] who refused to hire her

1 were aware that she engaged in protected activity.”). This is refuted by Mr.
2 Leyert’s own deposition. Mr. Leyert specifically testified that he reviewed
3 Plaintiff’s grievance about favoritism in route/truck assignments. ECF No. 55-1 at
4 199. Moreover, a genuine issue of material fact exists as to Mr. Loomis’s
5 involvement in the investigation of the sexual assault claim and Plaintiff’s
6 termination. Although Mr. Loomis claimed he was not a part of the firing process,
7 the termination letter was signed by and sent by Mr. Loomis to Plaintiff, and
8 Defendant has not presented any written policy confirming that center managers
9 merely sign off on termination letters as a matter of company practice. Further,
10 Mr. Fromherz, whom Plaintiff reported conflict with, assisted Ms. Hernandez Cruz
11 and Mr. Ramirez Castillo with contacting the EthicsPoint hotline, and the extent of
12 his involvement in Mr. Wiedenmeyer’s investigation is unclear.

13 Having concluded that Plaintiff raised a prima facie case of retaliation and
14 that Defendant proffered a legitimate, non-retaliatory reason for Plaintiff’s
15 termination—that is, for unprovoked assault under the CBA—the Court also has
16 no difficulty in concluding that Plaintiff has presented sufficient evidence of
17 pretext to avoid the entry of summary judgment for Defendant on this claim. As
18 recounted, multiple different accounts exist of what transpired on October 19,
19 2021, and certain aspects of Mr. Wiedenmeyer’s investigation—such as Mr. Leyer
20 drafting a termination letter before the investigation was completed—could lead

1 reasonable minds to differ as to whether Defendant's justification for Plaintiff's
2 separation was pretextual.

3 In sum, enough questions about the credibility of these parties, their
4 knowledge of Plaintiff's protected activities, and the possibility of pretext exist to
5 weigh against granting summary judgment for Defendant on this claim. *See*
6 *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004) ("In evaluating
7 motions for summary judgment in the context of employment discrimination, we
8 have emphasized the importance of zealously guarding an employee's right to a
9 full trial, since discrimination claims are frequently difficult to prove without a full
10 airing of the evidence and an opportunity to evaluate the credibility of the
11 witnesses."). Thus, the Court declines to grant summary judgment to Defendant on
12 Plaintiff's claims for retaliation.

13 **VI. Wrongful Termination in Violation of Public Policy**

14 Defendant argues that Plaintiff's wrongful termination claim is based on the
15 same set of facts as his discrimination and retaliation claims and therefore must be
16 disposed of. ECF No. 53 at 22. Having found that Plaintiff's retaliation claim
17 survives Defendant's motion for summary judgment, the Court declines to dismiss
18 the wrongful termination claim.

19 **VII. Other Affirmative Defenses**

20 Plaintiff seeks to dismiss the following defenses pled in Defendant's

1 Answer: (1) scope of managerial authority, (2) after-acquired evidence, and (3)
2 mitigation of damages. The Court dismisses the after-acquired evidence and
3 mitigation of damages defenses.

4 **A. Scope of Managerial Authority**

5 Plaintiff seeks to dismiss the following defense: “[T]hat any unlawful or
6 wrongful act, if any, taken by any of the officers, directors, supervisors, or
7 employees of Defendant were outside the scope of his/her authority and such acts,
8 if any, were not authorized, ratified or condoned by Defendant, nor did Defendant
9 know nor should it have known of such conduct.” ECF No. 7 at 13, ¶ 12.

10 Defendant points out that this is not truly an affirmative defense as it does
11 not have the burden of proof on this issue, which Plaintiff does not rebut. *See* ECF
12 No. 63 at 16 (citing *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th
13 Cir. 2002)). Therefore, the Court instead construes the defense as a denial. *See*
14 *Snap! Mobile, Inc. v. Croghan*, 2019 WL 884177, at *6 (N.D. Cal. Feb. 22, 2019)
15 (“The few authorities to address the subject have held that denials that are
16 improperly pled as defenses should not be stricken.”) (citation omitted); *see also*
17 *Ogden v. Pub. Utility Dist. No. 2 of Grant Cnty.*, 2:12-cv-584-RMP, 2016 WL
18 589870, at *2 (E.D. Wash. Feb. 11, 2016) (improper categorization as an
19 affirmative defense will not support striking the denial from the Answer). Further,
20 the parties’ substantive arguments reveal that a genuine issue of material fact

1 remains as to this issue.

2 An “employee is a ‘supervisor’ for purposes of vicarious liability under Title
3 VII if he or she is empowered by the employer to take tangible employment
4 actions against the victim.” *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).
5 A tangible employment action is “a significant change in employment status, such
6 as hiring, firing, failing to promote, reassignment with significantly different
7 responsibilities, or a decision causing a significant change in benefits.” *Id.* (citing
8 *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998)). As discussed *supra*,
9 there is room for reasonable debate as to what extent Mr. Fromherz and Mr.
10 Loomis were involved in Plaintiff’s termination and as to whether Plaintiff’s
11 working conditions—such as his truck assignment and package route—marked
12 significant changes in his employment status. Accordingly, the Court declines to
13 grant summary judgment to Plaintiff on this issue.

14 **B. After-Acquired Evidence**

15 Plaintiff seeks to dismiss Defendant’s after-acquired evidence defense. ECF
16 No. 52 at 17-18. Defendant opposes the motion, arguing that after-acquired
17 evidence justifies its termination of Plaintiff. ECF Nos. 63 at 4-5; 14-16. The
18 Court agrees with Plaintiff and dismisses this affirmative defense.

19 To prevail on an after-acquired evidence, a defendant must show that the
20 plaintiff would have been terminated on an independent basis from the act alleged

1 to have been motivated by discrimination. *See McKennon v. Nashville Banner*
2 *Publ'g Co.*, 513 U.S. 352, 362 (1995). When an employer obtains after-acquired
3 evidence of employee wrongdoing through the course of discovery, it must
4 establish that “the employee in fact would have been terminated on those grounds
5 alone if the employer had known of it at the time of discharge.” *Id.* at 362-63; *see*
6 *also O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 761 (9th Cir.
7 1996) (“An employer can avoid backpay and other remedies by coming forward
8 with after acquired evidence of an employee’s misconduct, but only if it can prove
9 by a preponderance of the evidence that it would have fired the employee for that
10 misconduct.”).

11 In the course of this lawsuit, Defendant maintains that it also uncovered two
12 independent bases for firing Plaintiff, including (1) that Plaintiff ran a personal
13 barbecue business during work hours in violation of the CBA, and (2) that Plaintiff
14 lied about his employment history on his job application, also in violation of the
15 CBA. Neither of these rationalizations allow Defendant to stake an after-acquired
16 evidence defense because Defendant had knowledge of both facts prior to
17 Plaintiff’s discharge for unprovoked assault.

18 The Court begins with the issue of Plaintiff managing his personal business
19 from work. The following colloquy, taken from Mr. Fromherz’s deposition, makes
20 it apparent that Defendant was quite aware of Plaintiff’s self-employment:

1 Q. [by attorney]: Did you ever have reason to believe that [Plaintiff]
2 was doing non-work activities during the workday?

3 A. [by Mr. Fromherz]: Like selling barbecue sauce?

4 Q. Possibly.

5 A. Yes. Well aware that Tahvio went around on his routes and tried
6 to sell barbecue sauce to everybody on it.

7 Q. How do you know that?

8 A. There – his cards would be on their desk. He would give them
9 samples. He would bring back stuff and ship it while he was still
punched in. There were all kind of different instances like that . . . he,
you know, started making barbecue sauce *and made everybody well
aware of it.*

10 Q. I just want to make sure I understand. So he would come back to
11 UPS and from UPS mail barbecue sauce?

12 A. Mm-hmm.

13 Q. While on the clock?

14 . . .

15 A. Yes.

16 ECF No. 55-1 at 192-93 (emphasis added).

17 In response, Defendant complains that Mr. Fromherz “did not have the
18 authority to discipline or terminate Plaintiff for selling barbecue products.” ECF
19 No. 64 at 10, ¶ 38; *see also* ECF No. 63 at 5. But the relevant question is one of
20 knowledge, not authority. Second, Defendant presses that Mr. Fromherz’s

1 knowledge should not be imputed to Defendant. But Mr. Fromherz explicitly
2 testified that “everybody” was aware of Plaintiff’s business and that it was done
3 out in the open. This, coupled with Plaintiff’s testimony that others frequently sold
4 their baked goods at the Yakima center as well, suggests that if there was a CBA
5 policy against selling handmade items while on the job, it was not enforced. *See*
6 ECF No. 72 at 11. As such, Defendant has not introduced a genuine issue of fact
7 as to whether it lacked constructive knowledge of Plaintiff’s barbecue business.

8 Second, Defendant cannot reasonably claim that it was unaware of
9 Plaintiff’s employment history. As Plaintiff does not dispute, he was terminated
10 from Wheeler Enterprises, the job he held prior to working for UPS, yet indicated
11 that he had never been fired from a previous job on his employment application.
12 ECF No. 54 at 13, ¶¶ 63-64. Plaintiff also allegedly used a fake name for his
13 supervisor/reference on the application. *Id.*; ECF No. 75 at 32, ¶ 64.

14 Defendant asserts that it was not aware of these falsities until Plaintiff’s
15 deposition. However, Defendant received an ethics report in October 2016 from
16 an anonymous caller who wanted to make Defendant aware that Plaintiff provided
17 a fake reference on his employment application and that he had been fired from his
18 former job. ECF No. 52-2 at 176. The caller also gave the name of then-
19 supervisor of Wheeler Enterprises, Trina Wheeler, and a private investigator whom
20 Ms. Wheeler retained because she believed Plaintiff was stealing money from the

1 company. *Id.* Nearly a month after the report was filed, Defendant contacted the
2 caller back to share that the report had been forwarded to management and that
3 “[w]e consider this matter closed.” ECF No. 52-2 at 176.

4 Defendant responds that it was not required to verify this report or “act on
5 anonymous rumors” in order to preserve this defense. ECF No. 63 at 5-6. Again,
6 the question is not one of action, but of knowledge. Therefore, the Court dismisses
7 this defense.

8 **C. Mitigation of Damages**

9 Plaintiff seeks to dismiss Defendant’s mitigation of damages defense. “As a
10 broad proposition, injured parties are expected to mitigate the damage they suffer.”
11 *Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 867 (9th Cir. 1980). To prevail
12 on a defense for failure to mitigate damages, a defendant must establish “that,
13 based on undisputed facts in the record, during the time in question there were
14 substantially equivalent jobs available, which the plaintiff could have obtained,
15 and that the plaintiff failed to use reasonable diligence in seeking one.” *Odima v.*
16 *Westin Tucson Hotel*, 53 F.3d 1484, 1497 (9th Cir. 1995) (quoting *EEOC v.*
17 *Farmer Bros. Co.*, 31 F.3d 891, 906 (9th Cir. 1994)) (cleaned up) (emphasis in
18 original). The defendant bears the burden of proving a failure to mitigate damages.
19 *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978).

1 Plaintiff alleges that Defendant has not produced any evidence proving that
2 substantially equivalent jobs were available. ECF No. 52 at 11. For its part,
3 Defendant contends that Plaintiff did not seek any comparable jobs but instead
4 chose to become self-employed, and that numerous issues of fact remain as to
5 whether Plaintiff's mitigation through self-employment was reasonable. ECF No.
6 63 at 11. Defendant also says that it has not received Plaintiff's monthly or annual
7 profit or loss forms yet, and that it needs those documents to prove its mitigation
8 defense. *Id.* at 12, n.3.

9 It appears that Defendant believes it does not need to produce evidence of
10 other substantially equivalent available jobs so long as it can prove that Plaintiff's
11 current self-employment is not substantially equivalent to his work at UPS. This
12 approach has not been sanctioned by the Ninth Circuit. To prevail on a mitigation
13 of damages defense, Defendant must provide evidence that substantially equivalent
14 jobs were available to Plaintiff during the time in question which Plaintiff did not
15 endeavor to obtain. To date, Defendant has submitted no declaration, report, or
16 other material from which a finder of fact could draw the conclusion that other
17 substantially equivalent jobs were available to Plaintiff outside of self-
18 employment. Although genuine issues of fact can exist as to whether a plaintiff
19 mitigated his damages through self-employment, *see Kloss v. Honeywell, Inc.*, 77
20 Wash. App. 294, 301 (1995), a defendant must nevertheless provide evidence that

1 other substantially equivalent employment existed. *Compare, e.g., McHugh v.*
2 *Papillon Airways, Inc.*, No. 2:05-cv-00976-RLH-PAL, 2008 WL 182259, at *7 (D.
3 Nev. Jan. 16, 2008) (genuine issue of material fact on mitigation of damages
4 defense where plaintiff was self-employed *and* Defendant submitted data regarding
5 employment rates of equivalent jobs in the area). Defendant did not do so, and
6 accordingly Defendant cannot prevail on its mitigation of damages defense.

7 **VIII. Punitive Damages**

8 Defendant argues that Plaintiff cannot recover punitive damages for
9 intentional discrimination or retaliation. A party may recover punitive damages
10 under Section 1981 “if the complaining party demonstrates that the respondent
11 engaged in a discriminatory practice or discriminatory practices with malice or
12 with reckless indifference to the federally protected rights of an aggrieved
13 individual.” 42 U.S.C. § 1981a(b)(1). “[A]n employer may not be vicariously
14 liable for the discriminatory employment decisions of managerial agents where
15 these decisions are contrary to the employer's good-faith efforts to comply with
16 Title VII.” *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (citation and
17 internal quotation marks omitted). However, the limit on liability does not apply
18 “when the corporate officers who engage in illegal conduct are sufficiently senior
19 to be considered proxies for the company.” *Passantino v. Johnson & Johnson*

1 *Consumer Prod., Inc.*, 212 F.3d 493, 517 (9th Cir. 2000).

2 Material issues of fact pervade as to what agents had a role in Plaintiff's
3 termination and the seniority of those persons. As such, the Court declines to enter
4 summary judgment for Defendant on this issue.

5 **CONCLUSION**

6 Plaintiff's claims for discrimination and a hostile work environment are
7 dismissed. Defendant's affirmative defenses of administrative exhaustion, statute
8 of limitations, laches, preemption, waiver and estoppel, after-acquired evidence,
9 and mitigation of damages are dismissed.

10 **ACCORDINGLY, IT IS HEREBY ORDERED:**

11 1. Plaintiff's Motion for Partial Summary Judgment (ECF No. 52) is

12 **GRANTED IN PART.**

13 2. Defendant's Motion for Summary Judgment (ECF No. 53) is

14 **GRANTED IN PART.**

15 The District Court Executive is directed to enter this Order and furnish
16 copies to counsel. The file remains **OPEN**.

17 DATED April 22, 2024.



18 A handwritten signature in blue ink that reads "Thomas O. Rice".
19 **THOMAS O. RICE**
20 United States District Judge